DISCUSSION

I. Ripeness

The injunctive and declaratory remedies sought by Liberty and Sixty Sutton are "discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution." Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967). Ripeness is a "constitutional prerequisite to exercise of jurisdiction by federal courts." Federal Election Comm'n. v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45, 51 (2d Cir. 1980) (citing Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937)). The rationale behind the requirement of ripeness is:

> to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Abbott Laboratories, 387 U.S. at 148-49. See also Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 200-01 (1983); In re Drexel Burnham Lambert Group, Inc., 995 F.2d 1138, 1146 (2d Cir. 1993). As the Court of Appeals put it, ripeness "turns on whether there are future events so contingent in nature that there is no certainty they will ever occur." In re Drexel Burnham Lambert Group, Inc., 995 F.2d at 1146; see also Amsat Cable v. Cablevision of Conn., 6 F.3d 867, 872 (2d Cir. 1993).

In determining whether an issue is properly considered ripe for adjudication, courts are to conduct a two-pronged inquiry. First, a court must "evaluate . . . the fitness of the issues for judicial decision." Abbott Laboratories, 387 U.S. at 149; Amsat Cable, 6 F.3d at 872; In re Drexel Burnham Lambert Group, Inc., 995 F.2d at 1146. In determining whether issues are fit for review, a court must look to "whether the agency action is 'final'" and "whether the issue is purely legal or whether 'consideration of the underlying legal issues would necessarily be facilitated if they were raised in the context of a specific attempt to enforce the regulations.'" In re Combustion Equip. Assocs., Inc., 838 F.2d 35, 37-38 (2d Cir. 1988) (quoting Gardner v. Toilet Goods Assoc., 387 U.S. 167, 171 (1967)). The second factor a court must look to in determining whether an issue is ripe is "the hardship to the parties of withholding court consideration." Abbott Laboratories, 387 U.S. at 149; Amsat Cable, 6 F.3d at 872; In re Drexel Burnham Lambert Group, Inc., 995 F.2d at 1146.

A. Liberty's Claims

1. First Amendment

In its first claim for relief, Liberty (as well as Sixty Sutton and Veerman) challenge certain provisions of the Cable Act, in particular, 47 U.S.C. § 522(7), which defines Liberty's Non-Common System as a "cable system", and 47 U.S.C. § 541(b), which imposes the franchising requirement on cable systems. (Second Amd. Compl. ¶¶ 71-75). Plaintiffs claim that

the imposition of a franchise requirement on Liberty's Non-Common Systems, including the Non-Common System at Sixty Sutton, "prevents, burdens, violates and interferes with Plaintiff's [sic] rights to engage in protected speech activity on private property in violation of the First Amendment to the United States Constitution." (Second Amd. Compl. ¶ 74). Plaintiffs assert that these two provisions are invalid both facially and as applied to the Non-Common Systems which do not utilize public property or rights of way. (Second Amd. Compl. ¶ 75).

The defendants have moved to dismiss plaintiffs' challenge to the Cable Act as unripe. The defendants rely heavily on Beach I, 959 F.2d 975, and argue that no meaningful distinction can be drawn between Beach I and the instant case.

In Beach I, the petitioners were SMATV companies that brought a facial challenge to the Cable Act's requirement, as interpreted by the Federal Communications Commission (the "FCC"), that "external, quasi-private" SMATV facilities be franchised. Id. at 980. The Court of Appeals for the District of Columbia Circuit explained that this type of facility was "a SMATV facility with wires or other closed transmission paths interconnecting separately-owned, controlled and managed multiple-unit dwellings, without those wires using public rights-of-way," id., a definition which exactly describes Liberty's Non-Common System. The petitioners argued that the FCC incorrectly interpreted the definition of "cable system" to cover external, quasi-private SMATV, and that this definition violated their First Amendment

and Equal Protection rights by requiring them to obtain local franchises. Id.

In considering whether plaintiffs' claims were ripe, the Court of Appeals noted that the obligations imposed by the Cable Act were not "fully defined" and thus were impossible to evaluate. Id. at 983. It was because of this uncertainty about the nature of the duty that a local franchising system might impose and because "the justification for that duty will depend on local facts" that the Court held that petitioners' First Amendment challenge was not yet ripe. Id. at 984. As the Court put it:

> We cannot find the statute unconstitutional on its face because we do not know whether conditions in any given locality will justify a burden on petitioners' speech, nor do we know what kind of burden will need to be justified, nor the appropriate First Amendment standard. Thus, we cannot assess any claim of First Amendment infringement absent an as-applied challenge to some specific franchising requirement.

Id. at 976.

In reaching this conclusion, the Court applied the twofold inquiry articulated in Abbott Laboratories, 387 U.S. at 136. With respect to the "fitness" inquiry, the Court explained that judicial review of a First Amendment issue is "likely to stand on a much surer footing in the context of a specific application of [the FCC's Cable Definition Rule] than could be the case in the framework of the generalized challenge made here." Beach I, 959 F.2d at 984 (citing Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 164 (1967)). Consequently, the Court

ruled, it was beneficial to postpone its review of petitioners' facial challenge until there was an as-applied challenge. Id. As the Court explained:

> Different regimes will impose different burdens, which may or may not be justifiable under the First Amendment. Moreover, the judicial standard for evaluating the justification will vary with the regime. . . . A particular local franchising system may impose only an "incidental" burden on the speech of SMATV operators . . . [or] may impose "direct" burdens that require stricter First Amendment scrutiny.

Id. (citations omitted). In addition, the Court noted that a "court reviewing an as-applied challenge will have specific information about the local conditions that might justify SMATV franchising." Id.

The second prong of the Abbott Laboratories test is, of course, "hardship to the parties of withholding review." Id. at 985. The Beach I Court explained that:

> "The paradigmatic hardship situation is where a petitioner is put to the choice between incurring substantial costs to comply with allegedly unlawful agency regulations and risking serious penalties for noncompliance."

959 F.2d at 985 (quoting Natural Resources Defense Council v. E.P.A., 859 F.2d 156, 166 (D.C. Cir. 1988)). Applying this standard to the situation in Beach I, the Court noted first that if the petitioners did not comply with the challenged regulations, the petitioners might face civil, or even criminal, penalties. Id. The Court then discussed, however, that it was "unclear" whether the petitioners would incur "substantial" costs by complying with the statute and the local franchising scheme.

Id. In addition, the Court also noted that the choice between compliance and the risk of enforcement could be avoided by bringing an "anticipatory, as-applied challenge," id., which I take to mean a challenge to a particular known burden, as opposed to an attack on the facial validity of the statute.[12]

a. Fitness for Judicial Decision

The Beach I analysis addresses a situation virtually identical to the instant action. With respect to fitness for judicial review, the Beach I Court's analysis is exactly on point. Liberty has not yet applied for a franchise from DOITT, and neither the NYSCC nor DOITT has taken any final action with respect to Liberty; in fact, perhaps it is more accurate to say that these agencies have just begun to address Liberty.[13] Also

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[12] This interpretation is supported by the Court's earlier comment that it could not "assess any claim of First Amendment fringement absent an as-applied challenge to some specific franchising requirement." Id. at 976 (emphasis added).

[13] By means of comparison, it is instructive to consider City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986), appealed after remand, 13 F.3d 1327 (9th Cir.), cert. denied, 114 S.Ct. 2738 (1994). In Preferred Communications, a cable company sued the City of Los Angeles and the Department of Water and Power ("DWP") alleging violation of its rights under the First and Fourteenth Amendment and under §§ 1 and 2 of the Sherman Act by the City's refusal to grant it a cable television franchise and by the DWP's refusal to grant access to DWP's poles or underground conduits used for power lines. Id. at 490. The Court of Appeals for the Ninth Circuit affirmed the dismissal of the antitrust claims, but reversed the dismissal of the First Amendment Claim. Id. at 491. The Supreme Court agreed that the First Amendment claim should not have been dismissed, but was "unwilling to decide the legal questions posed by the parties without a more thoroughly developed record of proceedings in which the parties have an opportunity to prove those disputed factual assertions upon which they rely." Id. at 494. Thus, even in Preferred Communications, where final agency action had been taken, i.e., the City had (continued...)

as in Beach I, Liberty cannot identify what burdens the franchising scheme might impose after weighing, inter alia, Liberty's non-traditional method of transmission and the technical limitations attendant thereto.[14] Many of the burdens are permissive

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[13](...continued)
refused to grant a cable franchise, the Supreme Court found the legal questions raised were not appropriately addressed at that time.

On remand, the Ninth Circuit was unwilling to adjudicate the cable company's First Amendment challenges to the City's franchising scheme until the City issued another request for proposals and the cable company was given the opportunity to apply and compete for a franchise. 13 F.3d 1327, 1332-33 (9th Cir. 1994). In that way, it could be determined whether the cable company was "ready, willing and able" to operate a cable system, whether it had the appropriate qualifications, and what the terms of the franchise might be. Id. The Court explained that:

> Since there are so many ways we might well avoid having to confront these difficult constitutional issues, it would be precipitous of us to try to reach them at this time. Were we to try, we would have to "decide the legal questions posed by the parties without a more thoroughly developed record. . . ," something the Supreme Court refused to do when reviewing our last opinion. If we failed to follow the Court's example, "we would not escape the charge of rendering advisory opinions poorly disguised as sweeping dicta."

Id. at 1333 (citations omitted).

[14] I note that Martin Schwartz, counsel for Time Warner, pointed out on March 1, 1995 at argument that the burdens of a franchise initially proposed by DOITT tend to differ markedly from the eventual franchise which results from extended negotiations between DOITT and the cable operator. As Mr. Schwartz explained:

> I can tell you that the end product usually looks a lot different from the city's initial proposal. So that goes to the question as to whether this rule making which invites comments is going to be similar or identical to what ultimately eventuates. I would suggest
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rather than mandatory (e.g., 47 U.S.C. § 545(a)(1) which allows cable operators to displace local franchising requirements relating to educational equipment obligations upon a demonstration of commercial impracticality), are graduated according to the number of channels delivered by the cable operator (e.g, 47 U.S.C. § 534(b)(1) which requires a cable system with 12 or fewer channels to carry at least three local commercial stations and a cable system with more than 12 channels to carry local commercial stations up to one-third of its channels; 9 NYCRR, part 595.4(b) which provides similarly graduated requirements with respect to

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> that there is a great deal to be determined in terms of what the terms would be for several reasons.

(Transcript of oral argument held March 1, 1995 and March 3, 1995 ("Tr.") at 47). Lewis Finkelman, counsel for the City, also explained that:

> [T]hese are proposed rules. . . . Liberty is free to comment to point out why some of these conditions are not appropriate to a system like theirs. That's the whole point of this proposed rule making process, so the city can get input. We have never given a franchise like this. There are many issues that obviously are going to be troublesome that we want comments from interested parties on and are willing to hear them in order to determine what the provisions should be of the franchise agreement.
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> It certainly is not a given [that the terms and conditions of the franchise finally authorized will be the same as those in the New Rulemaking]. And this is why, with respect to this process, it is certainly not a ripe challenge at this point.

(Tr. at 35-36).

public, educational or governmental ("PEG") access channels) or set limits that benefit prospective cable operators (e.g., 47 U.S.C. § 542(b) which provides a 5% cap on franchise fees but which does not prevent a municipality from accepting less). There is no way to know at this time what the ultimate mix of burdens might be. Also as in Beach I, 959 F.2d at 984, because we do not know the precise nature of the burdens imposed, it cannot be said what the appropriate level of scrutiny might be with which to evaluate plaintiffs' First Amendment challenge.[15] The factual record has simply not reached a stage of development

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[15] For example, in Turner Broadcasting Sys. v. Federal Communications Comm'n, 114 S.Ct. 2445 (1994), the Supreme Court decided that "the appropriate standard by which to evaluate the constitutionality of must-carry is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech." On the other hand, a less rigorous standard is applicable to broadcast medium due to the "unique physical limitations of the broadcast medium." Id. at 2456; see, e.g., Red Lion Broadcasting Co. v. Federal Communications Comm'n, 395 U.S. 367, 388-90 (1969); New York Citizens Comm. on Cable TV v. Manhattan Cable TV, 651 F. Supp. 802, 817-18 (S.D.N.Y. 1986) (explaining that "differences among the various modes of communication justify differences in the First Amendment standards applied to them" and declining to decide what standard of review should apply to cable television "without more facts about cable television").

at which these difficult questions are appropriately addressed.[16]

b. Hardship of Withholding Court Consideration

Turning to the question of the hardship to the parties, as was true of the petitioners in Beach I, it cannot be said on the facts currently in the record that any particular hardship will befall the plaintiffs if judicial decision-making is withheld for now. First, in the instant case, it is as yet unknown

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[16] I note that several of the items which Veerman and Sixty Sutton contend require discovery so "that the factual record [can] be sufficiently developed to allow meaningful appellate review" (MacNaughton March 8, 1995 letter, p. 1) are exactly the issues that one would expect a franchising authority to consider during the franchising process, e.g.:

> The specific policies and practices of the "must-carry stations" that would be implemented if Liberty were required to have a franchise. This would establish the specific number of channels that Jack A. Veerman and Sixty Sutton Corp. will lose if the franchise requirement is imposed on Liberty.
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> The specific construction costs for building a cable television system in Community District 6 where the Sutton Building is located.
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> The specific burdens of complying with the mandatory federal standards for . . . rate regulation pursuant to 47 U.S.C. § 593.
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> The specific burdens of complying with mandatory state standards for . . . PEG channels pursuant to 9 N.Y.C.R.R. § 595.4.

Letter of W. James MacNaughton, Esq., dated March 8, 1995.

what the "costs of compliance," 959 F.2d at 985, with the local franchising scheme might be -- given that the franchising process is on-going (See, e.g., Second Bronson Aff. ¶¶ 1-3, Ex. A). I do note, however, that the time periods set for the initial steps toward a franchise are relatively short and, therefore, that any delay on account of the franchising process may well be brief. Id. Second, the analogy to the risk of "serious penalties", id., is, presumably, the threat that Liberty's cable service will be interrupted.[17] However, whether the defendants will exercise their regulatory authority in such a way as to impinge upon the constitutional rights of the plaintiffs simply cannot be ascertained as yet.[18]

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[17] As W. James MacNaughton, counsel for Sixty Sutton and Veerman, colorfully put it: "the sword of [D]amocles and an order to show cause . . . [are] about to chop those wires." (Tr. at 109).

[18] The State has pointed out that the outcome of the administrative proceedings commenced -- but temporarily halted -- against Liberty should not be presumed:

> In the administrative proceeding before the [NYSCC], Liberty will be provided a complete and full opportunity to present evidence to support the exempt status of any locations that are commonly owned, controlled or managed. Contrary to Liberty's claims in its Amended Complaint at Paragraphs 65-66, its service to subscribers will not necessarily be terminated. It is also not true that the [NYSCC] will necessarily order Liberty to sever connecting cable, or pay fines or sanctions. Merely because the Standstill Order has been issued does not mean that the Commission has issued a final determination in this matter. In at least one prior case in which the [NYSCC] issued an Order to Show Cause against a system that served a condominium
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In addition, to the extent that any hardship might accrue to Liberty because of interruption to the Non-Common Systems it currently services or is ready to service, that hardship is of Liberty's own making. Liberty constructed its Non-Common Systems, including the system serving Sixty Sutton, from January 1993 to August 1994. (Price Aff. ¶ 12). Liberty did not, however, express any interest in obtaining a franchise from the City until October 28, 1994, several months after the NYSCC issued its Order to Show Cause. (Grow Aff. ¶¶ 7, 10, Ex. 8).

Liberty proffers a variety of reasons for its delay. First, Liberty asserts that it constructed its Non-Common Systems in reliance on alleged NYSCC and DOITT "policy" that a cable system which did not use City property or public rights-of-way did not qualify for and was not required to obtain a franchise. (Price Aff. ¶ 12). Liberty points to a April 27, 1992 letter from DOITT advising the Russian American Broadcasting Company ("RABC") that it did not need a franchise from the City to provide service because there was no proposed use of the inalienable property of the City. (Price Aff. ¶¶ 12-13; First Amd. Compl., Ex. C). Liberty also claims that its President, Mr.

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[18](...continued)
development, a Cease and Desist Order was not issued for one year. Even then, the [NYSCC] allowed the operator to apply for a franchise, which it did. The franchise was granted, and there was no interruption in service.

(Grow Aff. ¶ 32) (emphasis added).

Price, met with William Squadron, then DOITT's Commissioner, and Christopher Collins, then General Counsel, in mid-March 1992. (Price Aff. ¶ 14). Mr. Price claims that Mr. Squadron and Mr. Collins stated to him that Liberty did not need a franchise so long as no City property or rights-of-way were used. (Price Aff. ¶ 14). However, both Mr. Squadron and Mr. Collins have entirely different recollections of this meeting. They state that the issue of Liberty's operating Non-Common Systems was not discussed at the meeting, and that they both understood Liberty to employ service via microwave transmission, not via wire. (Collins Aff. ¶¶ 3-4;[19] Squadron Aff. ¶ 3).[20] Each also states unequivocally

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[19] Reference is to the Affidavit of Christopher Collins executed January 30, 1995. Collins states that at the meeting with Mr. Price:

> Mr. Price described to us [Collins and Squadron] a system which contemplated service to multiple buildings via microwave transmissions, not via wire. Since my understanding at that time was that Liberty's system exclusively employed microwave transmission between buildings, I can unequivocally aver that I did not make the statement Mr. Price has attributed to me.

(Collins Aff. ¶ 4).

[20] Reference is to the Affidavit of William F. Squadron executed January 30, 1995. Squadron states in part that:

> The installation which we inspected during that meeting was a single satellite reception antenna delivering cable television service to the residents of a single building, and Liberty's system, as described to us by Mr. Price, contemplated service to multiple buildings via microwave transmission, not via wire. I could not have stated that a "Non-Common System" operated by Liberty would not require a fran-

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that Liberty never asked him or anyone else whether a franchise was required by the City. (Collins Aff. ¶ 5; Squadron Aff. ¶ 4). Given that the accounts of what happened at this meeting are flatly contradictory, I do not rely on either plaintiffs' or defendants' account of this meeting.

But, assuming arguendo that first, Liberty relied on the letter to the RABC, second, that such reliance was somehow reasonable,[21] and third, that government employees can waive the requirements imposed by law,[22] this still does not explain why

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[20](...continued)

> chise because my understanding, then, and throughout my tenure, was that Liberty's system exclusively employed microwave transmission between buildings.

(Squadron Aff. ¶ 3).

[21] According to the NYSCC, RABC provides services in a manner quite different from the way in which Liberty does.

> The original proposal by RABC was to provide a single channel of Russian language programming, which had been initially made available via transmission over-the-air and which the company also wished to provide through wire or coaxial cable.
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> In contrast to the service provided by RABC, the service Liberty seeks to provide is a multi-channel service that includes the capacity to distribute as many as 72 channels. This service would be provided by wire or coaxial cable. . . . RABC's service is thus substantially different from the sort of service that Liberty seeks to provide.

(Grow Aff. ¶¶ 18-19).

[22] Under New York law, Liberty has no legal basis for relying on the RABC letter. See, e.g., Genesco Entertainment v. Koch, 593 F. Supp. 743, 749 (S.D.N.Y. 1984) (stating that "the New (continued...)

Liberty failed to approach DOITT and ask for a franchise. In addition, since January 1993, Liberty by its own admission has operated "cable systems" and is a "cable operator" required by the Cable Act to have a franchise. (Jacobs Aff. ¶ 7;[23] First Amd. Compl. ¶¶ 30-31). Furthermore, on June 1, 1993, the Supreme Court held in Beach III that SMATV operators which interconnect separately owned, controlled and managed building with cable were subject to the Cable Act, even if such cable is solely on private property.[24] Liberty clearly knew of this development in the

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[22](...continued)
York courts do not generally follow the doctrine of apparent authority in cases involving municipal defendants"). The District Court noted that, "New York places the burden of determining the scope of a municipal officer's authority upon those who deal with municipal government." Id. The Court explained that:

> Where the Legislature provides that valid contracts may be made only by specified officers or boards and in specified manner, no implied contract to pay for benefits furnished by a person under an agreement which is invalid because it fails to comply with statutory restrictions and inhibitions can create an obligation or liability of the city. In similar case [sic] this court has given emphatic warnings that equitable powers of the courts may not be invoked to sanction disregard of statutory safeguards and restrictions.

Id. at 750 (quoting Seif v. City of Long Beach, 286 N.Y. 382, 387-88, 36 N.E.2d 630, 632 (1941)). See also Restatement Second of Agency § 167 comment c (1958).

[23] Reference is to the Affidavit of Robert S. Jacobs executed on January 13, 1995.

[24] The issue facing the Supreme Court was whether there was a rational basis that justified the distinction between cable facilities serving separately owned and managed buildings and those serving one or more buildings under common ownership or management. Id. at 2099. The Court concluded that the common-ownership (continued...)

law.[25] However, as noted above, Liberty did not contact the City with respect to a franchise until October 1994, after the NYSCC issued its Order to Show Cause, and even then, it was in a single-sentence letter stating only that Liberty was "interested in applying for a cable television franchise pursuant to the Resolution No. 1639 and applicable federal law." (Grow Aff. ¶¶ 7, 10, Ex. 8). Particularly in light of the Beach III decision, there is no satisfactory explanation as to why Liberty did not request a franchise promptly after June 1, 1993.[26]

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[24](...continued)
distinction was constitutional. Id. at 2102. The Court noted that the Court of Appeals "evidently believed that the crossing or use of a public right-of-way is the only conceivable basis upon which Congress could rationally require local franchising of SMATV systems," id. at 2104, but the Supreme Court held, to the contrary, that "there are plausible rationales unrelated to the use of public rights-of-way for regulating cable facilities serving separately owned and managed buildings." Id.

[25] In fact, Liberty wrote to the FCC on April 7, 1992 urging the FCC in no uncertain terms to defend the definition of "cable system" against the constitutional challenges brought by the Beach petitioners. (Jacobs Aff. ¶ 9; Ex. T).

[26] See, e.g., Conn. State Federation of Teachers v. Board of Educ. Members, 538 F.2d 471 (2d Cir. 1976). In that case, plaintiffs were teachers' local unions who alleged a deprivation of their First and Fourteenth Amendment rights. Id. at 475. Plaintiffs complained that, among other things, "as a matter of school board policy", the majority teachers' union was given access to school facilities for its meetings, but that other groups had to "apply" to a designated official for permission to use the facilities. The Court noted that the plaintiffs had failed to allege that the local had ever requested permission to use the school facilities for a meeting; that such a request was denied; or, that if a request had been denied, it was denied for a constitutionally impermissible reason. Id. The Court went on to say that:

> If the [plaintiffs' local] is given permission freely to hold its meetings in school facili-
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Finally, any claim by Liberty that it will suffer hardship during the pendency of the franchising process is undercut by its requests for a thirty-day extension of time in which to answer the Order to Show Cause (Grow Aff. ¶ 8, Ex. 4) and later a one hundred-eighty day adjournment during which it agreed not to construct any new Non-Common Systems (Grow Aff. ¶ 10, Ex. 6).

On the other hand, a substantial hardship will be imposed on NYSCC and DOITT if plaintiffs are permitted to proceed in this Court because those agencies' ongoing proceedings on this very issue will be interfered with. Since the ripeness doctrine is intended not only to protect courts from premature adjudication, but also to "protect the Agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties," Abbott Laboratories, 387 U.S. at 148-149, 87 S.Ct. at 1515, this hardship must be weighed heavily. See also Payne Enters. v. United States, 837 F.2d 486, 493 (D.C. Cir. 1988) ("under the ripeness doctrine, the hardship prong of the Abbott Laboratories test is not an independent requirement divorced from the consid-

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> ties (and we will not assume, absent specific allegations, that the . . . defendants engage in unconstitutional conduct in this respect) the "difficulty" involved in requesting this permission from the designated official hardly can be considered an infringement on the First Amendment rights of [the local's] members.

Id.

eration of the institutional interests of the court and agency").

On balance, I find that it would be inappropriate to exercise judicial decision-making power at this time on these issues. See, e.g., Daley v. Weinberger, 400 F. Supp. 1288, 1291 (E.D.N.Y. 1975) (holding that physician's claims for declaratory and injunctive relief to prevent the FDA from inspecting her office not yet ripe where there was "no final agency action whose legality the court may pass upon" and noting that the "court is reluctant to anticipate what future action, if any, FDA may decide to take"), aff'd, 536 F.2d 519 (2d Cir. 1976), cert. denied, 430 U.S. 930 (1977).[27]

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[27] The situation facing the plaintiffs in the instant case can thus be distinguished from, e.g., that facing the plaintiff in Amico v. New Castle County, 553 F. Supp. 738 (D. Del. 1982), aff'd, 770 F.2d 1066 (3d Cir. 1985). There, plaintiff, who sought to open an adult entertainment center, contended that a county ordinance restricting where such facilities could be established impermissibly burdened his First Amendment rights, and the defendant moved to dismiss based, in part, upon ripeness. Id. at 739. The defendant argued that the case was not yet ripe because the plaintiff had not provided the county with information requested by the county without which, the county claimed, it could not make a final determination of plaintiff's application for his center. Id. at 742. Without that final determination, the county argued, the case was not ripe. Id. The Court rejected this argument. First, the Court pointed out that the county had not been able to specify what information it sought. Id. at 742-43. Second, and more importantly, the Court stated that it was "clear" that the county was not going to grant the plaintiff the necessary certificate of compliance. Id. at 743. This argument is inapplicable to the instant case, where it simply cannot be said that the City is going to deny Liberty a cable franchise.

Triple G Landfills v. Board of Comm'rs of Fountain County, 977 F.2d 287 (7th Cir. 1992) is inapplicable for similar reasons. In that case, plaintiff sought a declaration that a county ordinance regulating the development of landfills was impermissible under federal and state law. Id. at 288. The County argued that the case was not ripe because Triple G had not yet (continued...)

Despite Liberty's April 7, 1992 submission to the FCC agreeing that "the [Beach] Petitioners' claims of oppressive regulation are not yet ripe for decision" (Jacobs Aff., Ex. T at 2), plaintiffs contend that Beach I is inapposite. First, Liberty points to the Standstill Order, which forecloses Liberty from establishing Non-Commons Systems service to a number of buildings to which Liberty would otherwise commence the process of establishing cable service. Liberty claims that at that moment when Liberty is foreclosed from hooking up these other buildings, Liberty is harmed concretely enough to demonstrate that the action is ripe. However, Liberty's situation is in this regard no different from the situation facing the Beach petitioners. In Beach I, the Court noted that "[p]etitioners have

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[27](...continued)
applied for a state permit, the implication of which was that Triple G could not yet apply for a county permit, and so Triple G did not face an immediate threat of enforcement. Id. at 290. The Court found, however, that the case was ripe for reasons similar to those in Amico, namely, that the outcome was, in effect, predetermined:

> Given the virtually preclusive effect of the ordinance at the county level, there would be no point in requiring Triple G to engage in a state permitting process -- a process that the County itself admits is "withering and expensive." . . . The ripeness doctrine requires a live, focused case of real consequence to the parties. It does not require Triple G to jump through a series of hoops, the last of which it is certain to find obstructed by a brick wall.

Id. at 290-91. It cannot be said here that Liberty is certain to meet a brick wall in the franchising process. In addition, the Triple G Court noted that that case involved "purely legal" issues, id. at 289, whereas the instant case is fact-intensive.

standing because they currently operate external, quasi-private SMATV facilities or have concrete plans to operate such facilities." 959 F.2d at 980 n. 6. Thus, the fact that Liberty is providing cable service to subscribers and may have potential subscribers does not distinguish the ripeness of Liberty's claims from those of the Beach petitioners who also operated or had plans to operate SMATV facilities identical to Liberty's.

Second, Liberty attempts to distinguish Beach on the ground that the burdens which Liberty allegedly faces are more concretely known here. However, with respect to the burdens which might be imposed by the franchise, Liberty's situation differs little from that of the petitioners in Beach. As the Beach I Court put it:

> The Cable Act creates a franchise requirement, but gives localities broad discretion to determine the substance and process of franchising. The Act permits but does not require exclusive franchising. . . . Similarly, the Act does not generally require that localities impose special duties on franchisees, but simply permits localities to regulate cable rates, set aside public channels, or levy a franchise fee. And, in general, the statute gives only minimum specifications for the franchising procedures. In short, a locality could adopt a summary process for franchising every external, quasi-private SMATV facility, and local SMATV operators could discharge their . . . obligation by complying with this process. Such a franchising regime would pose very different First Amendment problems than a costly, exclusive-franchising system.

Id. at 983-84 (citations omitted). It is because of the degree of discretion given to the local franchising authorities that it cannot be said with assurance what the burdens of a franchise

awarded by DOITT might be for Liberty. In fact, Liberty itself recognizes that all of the burdens it may face are not yet known. (Liberty's Reply Mem. of Law in Supp. of Pls.' Mot. for a Prelim. Inj. at 32; Tr. at 58).

Liberty contends, however, that its dispute is ripe with respect to a number of "mandatory" burdens, that is, burdens which Liberty says are required to be imposed on it directly through federal regulation and which thus are now known. (Third Price Aff. ¶ 8).[28] As Liberty explained,

> If by operation of the challenged common-ownership requirement Liberty is subject to the mandatory minimum obligations imposed on a cable system, these obligations will include certain channel allocation requirements. Among these mandatory channel allocation requirements are "must-carry", see, 47 U.S.C. §§ 534 and 535, "leased access", see, 47 U.S.C. § 532, and public, educational and government ("PEG") channels, see, 47 U.S.C. § 531, Executive Law § 829(3) and 9 N.Y.C.R.R. § 595.

(Third Price Aff. ¶ 8). However, these requirements are the same as those that faced the petitioners in Beach. The Beach petitioners' "external quasi-private SMATV" is identical to Liberty's Non-Common System, and they faced precisely the same regulatory framework.

In addition, on the face of its pleading, Liberty is challenging the constitutionality of §§ 522(7) and 541(b),[29] that

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[28] Reference is made to the Affidavit of Peter O. Price executed on March 3, 1995.

[29] For example, in Liberty's first claim for relief, Liberty challenges the constitutionality of 47 U.S.C. §§ 522(7) and 541(b). (continued...)

is, the definition of a cable system and the franchising requirement imposed on such cable systems. With the franchising requirement, however, comes not only burdens but benefits, for example, the five percent cap on franchise fees contained in 47 U.S.C. § 542(b). Because the Second Amended Complaint is directed to the entire franchising requirement, such benefits are also subject to plaintiffs' challenge. The challenge in the Second Amended Complaint is not limited to a challenge of one or more of the mandatory burdens imposed,[30] and, indeed, certain such chal-

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[29](...continued)
(Second Amd. Compl. ¶¶ 71 - 75). Read together, these two sections impose the local franchising requirement, not mandatory federal burdens. The gravamen of the second and third claims is that Liberty was prohibited to operate its Non-Common Systems without a franchise, but DOITT did not provide for issuance of a franchise to this type of system. (Second Amd. Compl. ¶¶ 78, 81). The fourth, fifth, and sixth claims assert equal protection claims. (Second Amd. Compl. ¶¶ 84, 88). The sixth claim also asserts a Due Process claim. (Second Amd. Compl. ¶ 90). There is nothing in the rest of the claims asserted by Liberty even remotely susceptible of being interpreted as a challenge to mandatory federal burdens. (Second Amd. Compl. ¶¶ 92, 96, 99, 101, 104, 106). At no point in the pleadings does Liberty enumerate the particular burdens directly imposed by the Cable Act that it opposes. I also note that Liberty did not name the United States as a defendant.

[30] Liberty's challenge is different from a facial constitutional challenge to a particular aspect of the federal regulations. For example, the cable industry has challenged eleven provisions of the Cable Television Consumer Protection and Competition Act of 1992 and to two provisions of the Cable Communications Policy Act of 1984. See Daniels Cablevision v. United States, 835 F. Supp. 1, 3 n.1 (D.C. Cir. 1993), appeal docketed sub nom. Time Warner Entertainment Co. v. United States, D.C. Cir., No. 93-5349. In that litigation, the plaintiffs challenged various provisions individually, including rate regulation; must-carry; public access channels; limitations on ownership, control and utilization; vertically integrated programmers; public, educational and government access; and leased access. Id.

lenges could not be brought in this court.[31] Thus, plaintiffs' efforts to distinguish themselves from Beach by this method are unavailing.[32]

In short, defendants' motion to dismiss is granted with respect to Liberty's first cause of action.

2. Due Process

In its third cause of action, Liberty alleges that:

> Defendants' conduct which, inter alia, includes the prohibition of Liberty's operation of the Non-Common Systems without a franchise, and failure to provide the terms and conditions for issuance of a franchise to cable systems which do not use public property or rights-of-way, prevents, burdens, violates and interferes with Liberty's rights to engage in protected speech activity on private property in violation of the First Amendment.

(Second Amd. Compl. ¶ 81). The gravamen of Liberty's claim was that Federal and State regulations required Liberty to obtain a franchise, but that DOITT did not provide franchises for cable

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[31] For example, the constitutionality of the "must-carry" requirements set forth in 47 U.S.C. §§ 534 and 535 may only be heard by a district court of three judges convened pursuant to 28 U.S.C. § 2284. 47 U.S.C. 555(c)(1). I also note that the Supreme Court has addressed the constitutionality of the must-carry rules in Turner Broadcasting Sys. v. F.C.C., 114 S.Ct. 2445, 2469, 2472 (analyzing the must-carry rules under intermediate-level scrutiny and remanding in order to develop a more thorough factual record), reh'g denied, 115 S.Ct. 30 (1994).

[32] I also note the comment of the Beach court at 985: "Moreover, it is possible that petitioners might avoid the Hobson's choice between compliance and the risk of enforcement by bringing an anticipatory, as-applied challenge." The implication of this language is that a challenge more likely to be found ripe for adjudication would be a challenge to a particular burden which is going to be imposed, and not merely a broad attack upon the Cable Act itself.

systems such as Liberty's. This dilemma apparently constitutes the facts upon which plaintiffs rely on their sixth cause of action where they assert that "[d]efendants' conduct constitutes a denial of Plaintiffs' right to due process and equal protection in violation of the Fourteenth Amendment to the United States Constitution" (Second Amd. Compl. ¶ 90), and their eighth cause of action where they complain of Resolution 1639 as clearly inapplicable (ignoring Executive Law § 819)(2)), vague and investing the City with boundless discretion -- all in violation of plaintiffs' due process rights (Second Amd. Compl. ¶¶ 94-96).

The dilemma that Liberty faced when it filed its original complaint -- of being required to obtain a license to operate yet having nowhere to go to obtain one -- is not the current situation; the facts upon which plaintiffs relied in pleading these claims originally have changed.

It is undisputed that on February 24, 1995, DOITT published a notice of rulemaking regarding solicitations for franchises for the provision of cable service such as Liberty's, i.e., cable service which does not use the inalienable property of the City. (Second Bronston Aff. ¶¶ 1-2, Ex. A). According to DOITT, the rulemaking process is proceeding in accordance with the City Administrative Procedure Act. (Second Bronston Aff. ¶ 2). As part of this process, the public written comment period for the proposed rules is due to close on April 3, 1995, and a public hearing will be held on April 4, 1995. (Second Bronston Aff. ¶ 3, Ex. A). The proposed rules also set forth deadlines

for the submission of franchise applications, DOITT's review of such applications, and the preparation of franchise agreements. (Second Bronston Aff. ¶ 3, Ex. 1).

After DOITT certifies that an application is complete, it has sixty days to send a proposed franchise, which shall include "the terms of the applicant's certified application, the requirements of City Council Resolution 1639 and such other reasonable terms and conditions DOITT shall determine are appropriate to protect and advance the public interest." (Second Bronston Aff., Ex. A, § 6-03). Ultimately, in order for a franchise to be effective, it must be approved by the Franchise and Concession Review Committee as well as the Mayor. Id. There are no time limits on these particular steps in the franchising process. Id.

The intervening change in the factual circumstances necessarily altered the focus of Liberty's argument. As Lloyd Constantine, counsel for Liberty, stated at oral argument on March 1, 1994:

> "the day before yesterday, . . . there was no process. And now we have a process. And the process is fraught with and pock marked with boundless discretion."

(Tr. 45). At oral argument, Liberty complained that the RFP allowed the City unfettered discretion, both substantively and temporally, in how it grants franchises and that Liberty could